Town of Milford
Zoning Board of Adjustment Minutes
November 21, 2013
Carol M. Colburn Revocable Trust
Case #2013-15
Request for Motion for Rehearing by
Cornelia Roy, Michael H. Roy, Katherine Myer,
Marcy Stanton & James & Paula Davison

Present: Fletcher Seagroves, Chairman
Zach Tripp
Kevin Taylor
Mike Thornton
Joan Dargie

Katherine Bauer – Board of Selectmen's representative

Absent: Laura Horning
Paul Butler

Secretary: Peg Ouellette

Request of Cornelia Campbell Roy, Michael H. Roy, Katherine Campbell Myer, Marcy Stanton, and James & Paula Davison for a rehearing of Case #2013-15; filed in accordance with RSA 677:2, 3 and 4, and the Rules of Procedure, Rule XII, of the Town of Milford Zoning Board of Adjustment.

Minutes approved on January 16, 2014

Fletcher Seagroves, Chairman, opened the meeting and stated this was a request for a rehearing dated Nov. 1, 2013. He stated there were four members present this evening who sat in on the original case.

After some discussion, Z. Tripp made a motion to table the request for rehearing for Case #2013-15 to the next scheduled meeting on December 5, 2013. Further discussion followed as to whether that would fall within the required 30 day time limit, and when that timeframe began. The office received the request for rehearing on 11/1/13, so 12/5/13 would be outside the 30 days, and it was decided to hear the request this evening. Since Joan Dargie was in the audience at the meeting on the original application, members felt comfortable in going ahead.

K. Taylor brought up the Planning Board on Tuesday and said he thought the Conservation Commission was mentioned.

Z. Tripp said since this is a request for a rehearing, they must work from this application.

K. Bauer said the Planning Board did not grant final approval.

J. Dargie asked about the subject of the case.

F. Seagroves explained that the development was going to impact wetlands by crossing the wetlands in two locations; wetland impact of 10,800 SF and buffer impact of 19,762 SF.

J. Dargie asked whether the person requesting the rehearing was the woman who came and spoke.

F. Seagroves said yes, she came in late.

F. Seagroves stated this was a rehearing and the Board must decide if they did anything wrong when they heard and discussed the case and whether there was any real, new information that was not available at the time of the hearing that was brought forward. This would be a public meeting, but there would be no public input, only discussion among the Board members. He referred to IV-1 and C and read from the Handbook Paragraph IV-5 that states that a rehearing is designed to give the ZBA an opportunity to correct their mistakes before an appeal being filed to the Court and the coming to light of new evidence is not a requirement to grant a rehearing.

F. Seagroves asked whether the Board did an injustice to anyone by granting this. The case was heard in 2007 and a Special Exception was granted at that time. It had expired so they had to re-apply. He was not sure the Board did anything wrong. The request also stated the Conservation Commission supposedly didn't go over the seven criteria from the Ordinance. The Board received a letter from the Conservation Commission stating they agreed with this [Special Exception]. He didn't believe it was up to the Board to question how the Conservation Commission came up with their findings.

F. Seagroves mentioned the reference that the Board didn't use the tax map and said that tax maps are not official maps in this case as they don't show contour lines and areas of water.

J. Dargie added that they are not necessarily accurate.

F. Seagroves agreed. He said there were two people who signed the request who were not abutters, although one abutter is enough. We are discussing disturbing 10,000 SF of wetland. Breaking it down, would be 103' x 103' square. The buffer is 19,762 SF or 140' x 140'. We are discussing 85 acres of land on which this is being affected. He didn't see it as a big problem. This is a special exception that is allowed by zoning. He didn't feel the Board did anything wrong and didn't find any real, new evidence to cause him to change his vote.

K. Taylor said he didn't feel they had done anything wrong. We can't dictate to another Board, but wished the Conservation Commission had gone and walked the property again; there has been a six or seven year lapse. We went by the letter from the Conservation Commission. He suggested the boards need to work more closely and Conservation Commission needs to send a letter to ZBA that they find fault or not. He was torn about whether to rehear and ask the Conservation Commission for a report, but if they came back and said they found nothing contrary to 2007 they would putting a hardship on the developer.

M. Thornton said this would create a hardship on the developer because this requestor wants the developer to wait until August 2014 before any consideration. They say they "once heard a whippoorwill" and "suspect amphibian and reptile travel." There is no positive proof of impact on anything, and the developers seem to have gone through and considered that and was leaving the two 4' openings.
Z. Tripp said 4 x 4 or something like that.
J. Dargie commented on the waiting. This was approved in 2007 and nothing has been done. She asked what the big rush was to do anything on this property.
F. Seagroves said they might have had financial difficulties; they don't know. They have a letter from DES The applicants have to get a permit from DES who are more expert about what is happening with the water and wildlife.
J. Dargie commented DES relies a lot on the town. They approve and tell the Town to verify this and this was done.
M. Thornton said if they approve it, DES can disapprove it, can't they?
F. Seagroves said believed so.
M. Thornton said by their criteria, if the Board approves it, they stand blameless. If DES verifies something, there might have to be some adjustment.
J. Dargie said DES doesn't have enough people to review personally.
M. Thornton commented on seeing a lot of allegations and mights and maybes and coulds.
F. Seagroves said he saw in it they might do a site walk, etc., with the biologist. The Board can't postpone this and wait. They can't pass it if it isn't right. But what are they affecting? A small portion of land. What he was seeing was that they are talking about shutting down the whole project. That is not what the Board discussed.
Z. Tripp said the case on which they are requesting a hearing was specific to the wetland and buffer impact, not the subdivision as a whole. A lot of information in the request for rehearing was directed at the subdivision as a whole.
F. Seagroves agreed, that was his point. They want to prove that by putting a road in and affecting wetlands just for that road, he would look a lot closer. But to him everything in the request is geared toward the whole project. Rare species were brought up; the probability of hearing a whippoorwill or a frog.
M. Thornton added the fairy shrimp and said they are talking about more or less a quarter of an acre out of the whole project.
F. Seagroves said out of 85 acres.
J. Dargie asked whether the applicant had alternatives.
F. Seagroves said not according to the map.
Z. Tripp said, if he recalled public testimony correctly, the applicant stated something about wanting to be sure none of the house lots interfered with the wetlands or buffer, and that was the least impact route to get to the house lots.
F. Seagroves said that was his recollection and looking at the map it looks like that.
M. Thornton wasn't sure if the project put forward an "improved bridge" it would be acceptable to these people, or were they trying to stop the entire project because they want open space?
Z. Tripp said they are not doing a rehearing. They aren't trying to critique their case.
F. Seagroves brought out the ballot with three questions to be answered.
Z. Tripp answered questions 1-3 from the voting sheet.
1. *The application must be filed within 30 days of the ZBA decision* – The decision was made on 10/3 and they filed on 11/1 so that is within the requirement.
2. *Applicant must have standing, be an abutter or selectman or person who is impacted differently than the public at large.* – It wasn't clear to him who the applicant was. On page 6 or 7 there are

four signatures, two of them, Cornelia Roy and Michael Roy, are abutters who are listed in the abutter list, so they have standing. Katherine Myer and Marcy Stanton he didn't believe had standing. They are not abutters or town officials and he didn't believe would be impacted any differently than the public at large. They claim the fourth abutter couldn't get an opportunity within the 30 days to sign. Two have standing and two don't. Connie Roy did give public testimony, she is the first signature, and her name is mentioned throughout the application. He assumes she is the primary applicant and will use that assumption throughout his discussion.
F. Seagroves and Z. Tripp agreed that although she wasn't on the actual abutter list, they assumed Michael Roy was her husband, as they share the same address.

3. *New evidence which reflects a change of conditions that took place since the first hearing or information which was unobtainable because of absence of key people*. The Board should not be penalized because the petitioner had not adequately prepared his or her original case and did not take the trouble to determine significant grounds and provide facts to support them. Going through the request for rehearing application and picking out some key points. They made claims that relate to the disclaimer which comes with the Natural Heritage Bureau letter. Each agency often has a disclaimer like the one in the statement. If that was followed to the letter, per the applicant, then NHB assessment could not be used at all or probably could not be used in any case and would undermine NHB's mission to determine protective measures and requirements necessary for survival of native plant species in the state. Language in NHB's letter, paraphrasing, stated there was record of rare wildlife, plant or natural community present in the vicinity and they did not expect that would be impacted by the proposed project. The presence of the disclaimer does not constitute new information. They also cited a report by a scientist, Cynthia Nichols, of a survey done Oct. 23. No new evidence was submitted. It could have been done before the10/23 meeting. Mrs. Roy made comments that at that meeting that she had made comments about the wetlands to the Board. in 2007. Since she was present at the 2007 meeting she and other abutters and other interested parties had plenty of knowledge, time and background to conduct a study if it was needed. Mrs. Roy had not adequately prepared her original case. Reference was made to the DES train permit; he wasn't clear on her point with that. The applicant to the original case, Colburn, attached an approved permit that said wetland permit was required if applicable. He believed the applicant would follow all regulations in the permitting process. Again, not new information. Per early discussion, applicant made reference to the Conservation Commission not doing a good job of reviewing information. This is not new information, but a critique made by her, post-hearing.
Regarding a possible error by the ZBA, the "rehearing should be seriously considered if the moving party is persuasive that the board has made a mistake." "The rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the Court." The applicant stated the decision was not in harmony with the wetlands Ordinance. The Milford Zoning Ordinance allows property owners an avenue of relief from ordinances, including wetlands, by special exception. The Board heard evidence available at the time and addressed wetlands-specific section 6.02.7. Not being in harmony with wetlands was not an error, he believed, because the Board followed the procedures of a special exception case and doing the special exception questions. The applicant mentioned things where they felt there were improper findings of fact. They cited Cormier v. Town of Danforth in which the ZBA was reversed because there was nothing in the record that supported the ZBA's conclusion, that is his summary of the case. Per the petitioner's own application, this ZBA asked several questions of applicant, listened to public testimony and reviewed the application which included letters from the NHB and the Conservation Commission. Since the majority of the petitioner's application is refuting the evidence the ZBA heard and based its decision on, the evidence must be present for a decision. He disagreed with the logic they lacked proper evidence for a decision when the

applicant is refuting that evidence. Reference was made to how well they discussed the criteria. He agreed they may not have done so in as structured manner as in the past but they asked questions that addressed 6.07 directly. In answering questions they gave reasons. They did due diligence in discussing rationale. The petitioner said the findings were not based on facts in evidence and references two court cases regarding variances. He doesn't see the connection between the two. NHRSA was cited "findings of fact should be exclusively based on evidence." He believed the ZBA complied with that. They used evidence submitted at the original hearing and had no reason to question validity of the evidence at the time. For example, applicant claimed they inadvertently accepted that the three foot tall box culvert was not intended for all wildlife and deer and moose couldn't pass through it. He believed culvert is there for water and animals of a certain size to walk in the water and along the water. He didn't expect any size culvert to accept moose, unless it is a major highway. He didn't believe this evidence was misused; there is no error. Regarding the question raised by Mrs. Roy about the special exception and water use, the ZBA discussed wetlands and she raised overall concerns of the subdivision i.e. blasting that upset her water supply when the subdivision next to this one was built. That is part of the subdivision construction, not part of disturbing a wetland and buffer and putting a culvert back over it. If anything, putting a culvert there has allowed natural flow and should have minimal impact on water supply because it should flow like it normally would. He didn't believe this was an error. She said they didn't address open space and fragmentation of the path of wildlife. They are talking about a specific part of the wetland buffer impact. They were not there to address approval of the subdivision. If original applicant decided to build a bridge starting outside of one buffer and ended on the other side of the buffer it wouldn't have come to this case because it would have no impact. Failing to address this is not an error. Mrs. Roy does have standing. The original case was decided after careful consideration of all evidence on hand and the best possible judgment of the members. He didn't believe any purpose would be served by rehearing since the petitioner didn't present any technical errors made to her detriment and did not produce any new evidence that wasn't available to her at the time of the first hearing. Per the Handbook, to routinely grant all rehearing requests would mean the first hearing in any case would lose all importance and no decision would be made without two hearings. Mrs. Roy's application feels like that. After hearing the case, they put together information to refute it.

M. Thornton said he didn't see that they made errors in procedures. All of the reasons he could see were "ifs" and "could" and "might" and "observed by abutters" but didn't say who or their ability to judge what they were hearing. He didn't see the ZBA committed procedural error and agreed with Zach that to go back and do it again without new evidence, it was said they had to wait until Aug. 2014, didn't do justice to the applicants. He could not vote for a rehearing.

K. Taylor said he couldn't see that the ZBA made any error. Mrs. Roy's concerns were more that when they were blasting her well went dry and she was afraid when they start this development there wouldn't be enough water for everybody. She mentioned wetland, but he felt her main purpose was concern for her well going dry. In the other case, it was mentioned, they sort of brushed her off, telling her to go to the Planning Board. That is where it should have gone.

F. Seagroves said the Board was not there to hear that this evening.

K. Taylor said the Planning Board is there for that issue. They would handle site walks, etc. The ZBA had done all they could.

F. Seagroves commented, everything they are supposed to do.

K. Taylor agreed.

J. Dargie agreed and said, recalling the first decision, there was no new evidence. Most of the discussion is the subdivision, not specifically the wetland. She didn't feel the ZBA did anything in error when the vote was taken.

F. Seagroves said in answer to Z. Tripp's question, he believed RSA 677.2.4, persons entitled to request for rehearing, it discusses the fact that an individual is a taxpayer or resident does not give the individual standing to seek relief requiring the town to enforce its zoning ordinances.
Z. Tripp said they would have to be impacted differently from the public at large. His concern was the four signatures with only two having standing.
F. Seagroves said there is an abutter so this is a legal appeal. He then continued, saying he didn't see an error. He thought the Board made sure they answered the seven questions
Z. Tripp said they should go through them and the applicant answered them. He didn't think they should be questioning the NH Natural Heritage decision. The Board members are not
F. Seagroves agreed.
M. Thornton said the Board had no training or certification.
F. Seagroves said they only make decisions on the information provided. He didn't find anything new here.
M. Thornton said if these people were so concerned about this they were bringing forward now new information that wasn't available since 2007?
F. Seagroves things could have changed a little.
M. Thornton agreed.
F. Seagroves said he was giving them the benefit of the doubt.
M. Thornton said they could have had Natural Heritage out to do a walk-through between now and 2007. His concern was that it seemed they were trying to push it forward in time so the applicants would give up.
F. Seagroves said they were asked to make a decision on impact on the wetlands and buffer. It took wetland into consideration but one of his concerns was affecting water flow downstream. That affects another property. That is why you put a culvert in. They went over these things in the questions.
F. Seagroves called for a vote on the criteria.

1. Was the motion for rehearing filed within 30 days of the date of the ZBA decision?

K. Taylor-yes, Z. Tripp-yes, J. Dargie- yes, M. Thornton–yes, F. Seagroves-yes

2. Does the petitioner have standing to file a motion for rehearing?

Z. Tripp-yes, only Mr. & Mrs. Roy, J. Dargie-yes, M. Thornton-yes, K. Taylor-yes, F. Seagroves-yes

3. Has petitioner shown that the ZBA has made a technical error, or has the petitioner provided new evidence that was not available to the petitioner at the time of the hearing or the underlying action, or would an injustice be created if the motion for rehearing was denied?

K. Taylor-no, Z. Tripp-no to all, J. Dargie-no, M. Thornton–no, F. Seagroves–no

The Chair requested a motion.
Z. Tripp made a motion to deny the motion for a rehearing for Case #2013-15.
M. Thornton seconded.
Final Vote: (yes vote is to deny)
K. Taylor-yes, Z. Tripp-yes, J. Dargie-yes, M. Thornton-yes, F. Seagroves-yes